

E. I. Dupont de Nemours & Company and Chemical Workers Association, Inc., a/w International Brotherhood of Dupont Workers.
Cases 4-CA-17014, 4-CA-17370, and 4-CA-17395

January 16, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On March 16, 1989, Administrative Law Judge Norman Zankel issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed briefs in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this decision.

Although we agree with the judge's analysis of the issues involving the railroad map and the business ethics policy, and his findings of 8(a)(5) violations as to both, we part company with him on his findings and conclusions with regard to the "Principles of Progress" videotaping. The Respondent, having formulated six principles¹ around which it proposed to conduct its business, elected to disseminate them to its work force of several thousand employees through a professionally produced videotape. On December 1, 1987, the Respondent's training center issued a memorandum to its human relations network staff requesting them to select employees in their sections to be interviewed on videotape regarding their opinions about the Respondent's new principles. The Union found out about this request and immediately requested bargaining. It contended that the use of unit employees for such purposes was a condition of employment. The Respondent's response was that, because the employees' participation was voluntary, it was not required to provide notice and an opportunity to bargain about the videotaping to the Union.

The videotaping took place about December 9, 1987. Two of the 10 bargaining unit employees who took part in the taping testified at the hearing. Both testified that they were notified that they had been scheduled to participate, but that they were not told they had to appear.² There is no evidence that supervisory or management personnel conveyed to the em-

ployees that participation in the taping was part of their jobs. The Respondent has filmed bargaining unit employees in the past; however, it has never informed the Union of these instances. Union President Morris maintained without contradiction that he was unaware of such instances until the Union began investigating the instant case.

The judge concluded that the Respondent violated Section 8(a)(5) and (1) by soliciting employees to participate and videotaping them in "Principles of Progress" without first having given the Union notice and an opportunity to bargain about those actions. He found the issue to be a mandatory subject for collective bargaining, applying *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), in which the Supreme Court upheld a Board finding that in-plant food prices and services are a mandatory subject of bargaining. The Court's decision rested primarily on the following considerations: (1) that the matter is of deep concern to workers; (2) that the matter is plainly germane to the working environment; and (3) that the matter is not among those managerial decisions which lie at the core of entrepreneurial control.

Applying the *Ford Motor Co.* criteria, we reach the opposite result and find that no violation was committed with respect to the circumstances relating to "Principles of Progress." Not only did the Respondent maintain that the employees' participation in the video was voluntary, but also the employees apparently understood that to be the case. Regardless of how the Respondent may have disseminated its request that they participate, it effectively communicated to them that they retained an element of choice in the decision. Had the Respondent ordered or compelled the employees to participate, we would be faced with a different matter because, in that situation, the videotaping would have become a condition of employment, and a refusal to comply with the order could potentially have resulted in discipline for the employee. Here, however, because the employees were free to decline to participate, the videotaping could not have been a matter of deep concern to the employees nor "plainly germane" to their working environment.

We are also persuaded that the videotaping was not a mandatory subject of bargaining by the fact that it did not constitute a part of the employees' day-to-day responsibilities. If participation in company videotaping had been included as part of their regular job duties, we would be more likely to view it as a term or condition of employment giving rise to a mandatory bargaining obligation; in that case, it would arguably become "plainly germane" to their working environment. *Ford Motor Co.*, supra.³ This combina-

¹ Safety, health and environmental, people, manufacturing costs, quality, ethics, and change and renewal.

² One of the two, Lorraine Pobanz, testified that she participated voluntarily in the filming.

³ Thus, for example, if an employer asked employees to take a wage cut voluntarily, the employer would still be required to bargain. Because wages

Continued

tion of factors—that the employees' participation was voluntary and that participation was not a part of their regular duties—militates against finding a mandatory bargaining obligation on the part of Respondent over the videotaping.

Nor do we find that the final *Ford Motor Co.* consideration, whether the matter is among those managerial decisions that lie at the core of entrepreneurial control,⁴ suggests a mandatory bargaining obligation on the Respondent's part. We find that this videotape remained within the sphere of management prerogative because it was conceived and executed as an instrument merely to disseminate newly formed management principles to a broad audience of both unit and nonunit employees. There was no attempt by management to erode the Union's status as exclusive bargaining representative or to put itself into a more advantageous posture for negotiations. The videotaping did not represent any change in an important facet of the daily lives of unit employees, nor impinge on their employment security. The Respondent's plan to communicate the principles throughout the plant, as well as its means of doing so, were legitimate management decisions which, under all the circumstances, we find to be excluded from the mandatory subjects of bargaining defined in Section 8(d) of the Act.

Contrary to the judge, we are not persuaded that the vice present in *Bob's Big Boy Restaurants*, 264 NLRB 432 (1982), is present here. In that case, the employer, while refusing to recognize or bargain with the union as ordered by the Board, conducted attitude surveys seeking employees' opinions about how to improve working conditions. The Board held that such direct dealing constituted individual bargaining in derogation of the employer's bargaining obligation to the union in violation of Section 8(a)(5) and (1).⁵ Here by contrast, there is no complaint allegation of unlawful direct dealing with employees that has as its purpose or effect the erosion of the Union's status as exclusive bargaining representative.

expressly fall within the bargaining obligation defined in Sec. 8(d) of the Act, any proposed change in those rates would be subject to mandatory bargaining. See *Preece Coal Co.*, 289 NLRB 731 (1988), in which the employer directly approached employees to ask them to take a pay cut at a time when it was bound by an existing collective-bargaining agreement, and was found to have violated Sec. 8(a)(5) and (1).

⁴In its discussion of this subject, the Supreme Court in *Ford Motor Co.* relied on the concurring opinion of Justice Stewart in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 223 (1964):

Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of Section 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of the corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.

⁵See also *Alexander Linn Hospital Assn.*, 288 NLRB 103 (1988), enfd. sub nom. *NLRB v. Wallkill Valley Hospital*, 866 F.2d 632 (3d Cir. 1989). Cf. *United Technologies*, 274 NLRB 1069 (1985).

We are also not faced with an employer's effort to solicit grievances with an express or implied promise to improve benefits or conditions of employment, in derogation of a union's effort to organize employees or to negotiate an agreement.⁶ Nor does this case present an effort by the Respondent to interrogate employees in order to ascertain their union sentiments, the extent of their union activities, or the identity of union activists.⁷ We hold that under the unique circumstances presented, employees had the freedom to choose whether to participate in the taping, and when such participation was not part of their regular duties, the Respondent did not violate the principles enunciated in *Ford Motor Co.* by soliciting unit employees to participate in the filming of a videotape intended merely to disseminate throughout its plant certain business principles it had devised.

For the foregoing reasons, we find that the Respondent was under no obligation to notify and bargain with the Union over its plan to use bargaining unit employee volunteers in videotaping "Principles of Progress." We therefore dismiss the complaint allegations relating to the videotaping. We have amended the conclusions of law, the remedy, the recommended Order, and the notice accordingly.

AMENDED CONCLUSIONS OF LAW

Delete Conclusions of Law 4 and 5 and renumber the subsequent paragraphs.

AMENDED REMEDY

1. Delete paragraphs (A) and (B) and reletter the subsequent paragraphs.

2. Substitute the following for the judge's paragraph (E).

"E. Upon the Union's request, incorporate any agreements reached upon the subject matter of the ethics policy into a written document, and sign it."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, E. I. du Pont de Nemours & Company, Deepwater, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(a) and (b) and renumber the subsequent paragraphs.

2. Delete paragraphs 2(a) and renumber the subsequent paragraphs.

3. Substitute the attached notice for that of the administrative law judge.

⁶See *Gordonsville Industries*, 252 NLRB 563, 568 (1980). Cf. *Leland Stanford Jr. University*, 240 NLRB 1138, 1142-1144 (1979).

⁷See *Pennsy Supply*, 295 NLRB 324 (1989), *Camvac International*, 288 NLRB 816, 819-820 (1988), and *Taylor Chair Co.*, 292 NLRB 658 fn. 2 (1989).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT attach conditions to the delivery to Chemical Workers Association, Inc. a/w International Brotherhood of Dupont Workers of the original or an exact copy of a wall-size map showing the location of the Chambers Works narrow gauge railroad between 1965-1970.

WE WILL NOT apply our business ethics policy to employees in the bargaining units described below unless we first give the above-named labor organization notice of such intention and a chance to bargain with us about it:

The two bargaining units described in our collective-bargaining agreements dated October 22 and November 5, 1982 are appropriate bargaining units under Section 9(b) of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of any of their rights listed at the top of this notice.

WE WILL immediately deliver the original or an exact copy of a wall-size map showing the location of the narrow gauge railroad at Chambers Works between 1965-1970, to Chemical Workers Association, Inc., a/w International Brotherhood of Dupont Workers, on request of that labor organization.

WE WILL, on request, bargain collectively with the above-named labor organization over application of our business ethics policy to the bargaining unit employees described above and, if agreements are reached, WE WILL put them in writing and sign them.

WE WILL immediately rescind any and all disciplinary action taken against any bargaining unit employee for breach of our business ethics policy; and WE WILL remove all references to such discipline from the employees' personnel records, and will simultaneously notify such employees and the above-named labor or-

ganization, in writing, that such rescission has been accomplished and that no disciplinary action in the future will be based on the discipline so rescinded.

E. I. DU PONT DE NEMOURS & COMPANY

Dona Nutini, Esq. and *Henry R. Protas, Esq.*, for the General Counsel.

Charles E. Mitchell, Esq., of Wilmington, Delaware, for the Employer.

Howard S. Simonoff, Esq., of Haddonfield, New Jersey, for the Union.

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on October 19 and 20 and on November 30, 1988. The charge in Case 4-CA-17014 was filed on December 18, 1987; in Case 4-CA-17370 on May 18, 1988; and in Case 4-CA-17395 on May 26, 1988. A consolidated complaint was issued July 22, 1988.

At all material times, the Union has been the exclusive collective-bargaining representative of the Employer's production, engineering, stores and transport, construction, and laboratory and clerical employees at its Deepwater, New Jersey facility.¹

The complaint alleges the Employer refused to bargain collectively with the Union by soliciting bargaining unit employees to participate in a videotaping program and by actually videotaping such employees without having first given the Union a chance to bargain over the subject; by refusing to provide the Union with a wall-size map of a narrow gauge railroad which operated at Chambers Works between 1965 and 1970 (claimed to be information necessary and relevant to the Union's performance of its function as collective-bargaining agent); and by unilaterally implementing a "Business Ethics Policy" for bargaining unit employees.

At the hearing, all parties had opportunity to introduce and meet material evidence and to argue orally on the record. All parties filed posthearing briefs.

On the record before me, and from my observation of the demeanor of the witnesses, and after careful consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a Delaware corporation, has been engaged in the manufacture of chemicals and related products. During the calendar year immediately preceding complaint issuance, the Employer, at Chambers Works, purchased and received goods and materials exceeding \$50,000 in value directly from points outside New Jersey.

¹ The Union represents these employees in two bargaining units, the descriptions of which are contained in collective-bargaining agreements with the Employer (see G.C. Exhs. 2-5). All parties agree the units described in those documents are appropriate for collective bargaining under the Act.

The Employer admits, the record reflects, and I find it has been an employer engaged in commerce within the meaning of the Act at all relevant times.

All parties agree, the record reflects, and I find that the Union has been a labor organization within the meaning of the Act at all relevant times.

II. THE ISSUE

Did the Employer fail and refuse to bargain collectively in good faith with the Union by failing to notify the Union of its intention to solicit employees to participate in videotaping and failing to give the Union a chance to bargain about that subject; by neglecting its duty to furnish information; and by engaging in impermissible unilateral conduct when it implemented its business ethics policy to bargaining unit employees?

I shall answer each question posed affirmatively and find the Employer violated the Act in every respect alleged in the complaint.

III. THE FACTS²

A. Background

The Union has been the contractual collective-bargaining representative of two units of employees at Chambers Works for many years: the production unit of approximately 2200 employees; and the clerical unit of approximately 186 employees.

Chambers Works encompasses an area of about 4 or 5 square miles. The Employer conducts a variety of activities at that site. It manufactures tetra ethyl lead (freon) products used as refrigerants, agrichemicals, and polymer products. The Employer also engages in chemical research and laboratory testing of its products at that facility.

Also, the Employer maintains a waste water facility at Chambers Works. There, most of the chemical waste which evolves from manufacturing functions is treated at the waste water treatment site and then solid residues are buried in a protective lined landfill at that location.

At least between 1965 and 1970, the Employer operated a narrow gauge railroad at Chambers Works. The railroad was used for a variety of purposes, among which was transportation of chemicals and waste materials from buildings on the site to areas at Chambers Works where they were dumped into unprotected underground locations. Both the railroad's tracks and many of the buildings serviced by the railroad were no longer in existence in 1987. At that time, neither the railroad tracks nor locations of former buildings were visible. The precise dates of demolition do not appear in the record.

B. Videotaping

On December 3 or 4, 1987, Union President L. Morris first learned of the Employer's intention to produce a videotape entitled "Principles of Progress." That information came to Morris' attention when he was delivered a copy of

an interoffice memorandum, dated December 6, 1987 (G.C. Exh. 6). The memorandum originated in the Employer's training center and was addressed to the Employer's human relations network staff.

The memorandum advised the recipients that they should select employees to be interviewed "for the forthcoming videotape on the 'Mission and Principles' recently developed by the plant staff." The memorandum contained guidelines for selection of employee participants and directed that selections be made by December 4.

A day after Morris received the interoffice memorandum, he learned that two clerical unit employees had been asked to take part in the videotape program. Morris immediately contacted R. Little, business unit manager for the Chambers Works human relations department. Little acknowledged the Employer was canvassing unit employees to participate in the videotaping.

Morris protested that the Employer did not notify the Union of its intentions and claimed the use of unit employees for such purposes was a condition of employment. Little responded that employees' participation was strictly voluntary and the Employer was, therefore, not required to bargain about that subject.

The record reflects that the videotaping of employees was conducted at least on December 9. Two clerical bargaining unit employees, Phyllis S. Shields and Lorraine Probanz, who participated in the videotaping testified at the instant hearing. Each said she was interviewed on that date in front of videotaping equipment and answered questions concerning quality, costs, and ethics at the plant.

Although each testified in conclusory terms that she voluntarily took part in the interview, each also was uncontradicted in her testimony that her participation directly resulted from directives of their supervisors. Thus, Shields testified that E. Stafford, her supervisor, told her she had been scheduled to participate, and Probanz asserted that R. Pierce, her supervisor, told her he would like Probanz to participate in the taping.

Both Shields and Probanz were asked questions by an individual who was not regularly employed by the Employer, but who had been engaged specially to produce the videotape in question. Each provided unrehearsed answers for about one-half hour. The final version of the tape (viewed at the hearing) runs about 26 minutes. Only about 43 seconds of Shields' and about 30 seconds of Probanz' interviews appear in the final tape. Only their responses to certain questions appear, but not the questions. There is no dispute that those responses are accurate reproductions of the portions of their interviews selected for final inclusion in the tape.

Shields and Probanz spent in excess of 1 hour of their regular working time on December 9 waiting for, and participating in, their separately conducted interviews. The Employer paid them for this time.

A day after Shields and Probanz were interviewed and taped, each was asked to sign a release (G.C. Exhs. 15, 16). That document gave the Employer broad permission to use, "reproduce, copyright and publish, for commercial and art purposes, in any medium of communication . . . with or without my name or accompanying quotation or voice recording, the . . . videotape." The release indicated the tape was, and would remain, the Employer's property and that the

²The operative facts are substantially undisputed. Those reported here are a composite of unrefuted evidence, admissions, stipulations, and undisputed documents. Not every bit of evidence, or argument based on it, is discussed. However, each has been considered. My factual presentation contains only those matters I conclude are relevant and essential to a resolution of the issues. Omitted material is deemed irrelevant, superfluous, or of no probative value.

Employer "shall have the right to make alterations in . . . [it]."

Shields and Probanz were given a chance to preview the completed tape on February 8. Morris and Union Vice President D. Robertson attended the review. There is no evidence that any of them found what they saw objectionable in any respect.

The parties stipulated that a total of 10 bargaining unit employees (including Shields and Probanz) appear in the tape's final version (see G.C. Exh. 17).

On December 15, the Union and Employer conducted a regularly scheduled monthly joint executive meeting. The Union objected to the Employer's unwillingness to bargain over the videotaping. The Union claimed it was a condition of employment and asked to see the completed product. In support of its request for viewing, the Union cited an example of the Employer's previous videotaping of employees which came to the Union's attention after its completion. On review, the Union had complained the earlier tape contained distasteful scenes, and the Employer agreed to destroy that tape.

The Employer agreed to show the completed "Principles of Progress" tape to the Union. Either Little, or his assistant H. Gonzalez, said the Employer would take the Union's request for bargaining about the tape under advisement and respond at a later time.

The next day, Morris learned of a second videotape on safety from a union steward who told Morris he recently had been taped together with other unit employees and the plant manager. Morris again objected to Little that the Union should have been notified of the Employer's intention to tape and given a chance to bargain. Little said he believed the Employer had no obligation to bargain over the videotaping. (The safety tape does not appear as an issue in the instant case.)

Morris immediately consulted the Union's attorney who filed the charge in Case 4-CA-17014.

The parties' collective-bargaining agreement contains negotiated procedures for the Employer's solicitation of employee volunteers. The situations are explicit, few, and limited. Essentially, such procedures apply to work-related lateral transfers of unit employees (1) between buildings at Chambers Works, (2) among work crews of inspectors in the logistics department, (3) among work crews in the mechanical department, and (4) among laboratory technicians who want to move from one location to another.

Historically, the Employer also has sought volunteers without recourse to the provisions of the collective-bargaining agreement. Such a situation applies to annual United Way campaigns. For that project, the Employer and Union cooperate. The Employer has advised the Union in advance of its intention to conduct those campaigns and the Union agreed that management officials could solicit unit employees' participation.

There are other examples of the Employer's solicitation of unit employee participation in situations not covered by the collective-bargaining agreement. They involved (a) temporary transfers of employees between Chambers Works and another of the Employer's facilities (Repauno plant) situated nearby, (b) wear-testing of new clothing, and (c) educational training. The record reflects that the Employer consistently

gave the Union prior notice before solicitation of volunteers for any of these programs.

C. The Railroad Map

The Union conducted several meetings at which numerous clerical workers, in particular, expressed concern over a significant increase in the incidence of breast and cervical cancer among the Chambers Works employees. Also, the employees noted a high rate of open heart surgeries and brain tumors afflicted employees at that facility.

The Union became concerned that situation might be attributable to prolonged exposure of employees to toxic chemicals. Morris explained, "One of the probably most destructive, life destructive chemicals that was used on the (Chambers Works) site back when the narrow gauge trains were utilized on the plant was betanaphthelamine which was the cause of bladder tumors and we (had) somewhere in the neighborhood of 300 people that died as the result of bladder tumors working with the betanaphthelamine on that plant site." (Tr. 37.)

The record reflects the railroad track removal occurred concurrent with the Employer's installation of the protective lined landfill and construction of the wastewater treatment plant. Before the advent of the lined landfill, the waste chemicals were taken over the narrow gauge tracks to a variety of locations at Chambers Works and dumped into open trenches along the tracks. Each dumping site was then covered over. As earlier indicated, the dumping sites ultimately became totally obliterated from view.

In early February 1988, Morris orally asked an engineering supervisor, S. DeFrank, for a copy of a plant map which showed the location of the narrow gauge railroad tracks before the tracks were removed.

Morris' request for the map was conveyed to the Employer's human relations department. Morris was advised the Employer would furnish the map if the Union would agree to restrict its use and not provide the map to outside (nonunion) sources without the Employer's written permission. Morris found this response unsatisfactory. He turned the problem over to Union Vice President Robertson and to Union Treasurer, W. Gant.

Gant and Human Relations Representative Gonzalez discussed the map issue on April 28, 1988. At Gonzalez' request, Gant submitted the map request in writing. (See G.C. Exh. 14.) The request was for a "wall size map [which] show[s] the narrow gauge railroad in a time that fairly represents the Plant in a period between 1965-1970."

In early June, Jamison delivered a copy of the map to Robertson. Also delivered was a document (R. Exh. 1) which contained the language of the Employer's proposed restrictions on the map's use. Following is the full substantive text of the agreement.

The Union agrees that:

[T]he map provided will be used exclusively by the Union and its legal counsel for Management/Union in-plant business only for the purpose of addressing matters affecting bargaining unit employees.

The map will not be provided to any outside source such as governmental entities, interest groups, media, etc. without Management's written permission.

Copies of the map will not be made.

Little testified these restrictions were attached to the delivery of the map to the Union because the Employer was "very concerned about misuse or misinterpretation of the map" (Tr. 159). In this connection, Little asserted he had heard Morris make unfair characterizations about Chambers Works in terms of health and safety performance to a municipal incinerator site commission. Little claimed he was "concerned" that Morris might "use the map in some way to try to substantiate or support those misleading statements" (Tr. 159.)

Also, Little candidly testified the conditions were imposed "to make sure that . . . [the map] . . . was used in an appropriate way" (Tr. 207). He further explained this meant "a way that Dupont felt was appropriate" and "to its interest" (Tr. 207).

Finally, Little summarized that the conditions were needed "just to make sure that people had a full and clear understanding of whatever may have taken place [sic] in the past . . . we just wanted to make sure that people had all the things to consider when they looked at [sic] anything associated with the map, and any of the places where materials may have been dumped in the past" (Tr. 214).

Roberson was instructed to return the map, because of the proposed restrictions. He did so the day following its receipt. There is no evidence the Union made any use of the map.

No union representative has ever signed the agreement. Morris testified, in effect, that the restrictions impeded the Union's intended use of the map to assist it in conducting an environmental impact study. (The Employer does not dispute the Union's claim the map was relevant and necessary to performance of its collective-bargaining obligations.)

According to Morris, such a study would involve identification and examination of former dumping sites by consultants of the Union's selection. Morris also testified the Union could not agree to withhold relevant information from applicable governmental agencies. During cross-examination, Morris acknowledged the proposed agreement contained a provision for the Employer's authorization for such use.

The Employer has made no effort to deliver the map any time after it had been returned by the Union, and the Union has remained steadfast in its refusal to accede to the terms for the Union's use of the map.

D. The Ethics Policy

Before September 1987, the Employer maintained a Business Ethics Policy at Chambers Works. The policy was in writing. In effect, it set forth a code of conduct which the Employer expected its personnel to maintain in functioning on the Employer's behalf. Apparently, the policy had not been explicitly applicable to bargaining unit employees up to that time.

The Employer presented the Union with a copy of the ethics policy (G.C. Exh. 7) at their joint management/union executive committee meeting on September 21, 1987. The Employer representatives said they wanted the policy to apply to bargaining unit employees.

The Union asked why the Employer wanted to impose a management document upon bargaining unit employees. The Employer answered that there had been two or three cases where employees had been involved in questionable behavior and the Employer felt it was necessary to make its ethics

policy applicable to the bargaining unit personnel as well as management officials.

The Employer said it was presenting the policy to the Union at the September 21 meeting so the parties could negotiate over its applicability to bargaining unit employees. The Union examined the written policy at that meeting and told the Employer there would be questions about the policy and the Union would raise them at a later date.

Morris later studied the Employer's ethics proposal, conferred with the Union's legal department, and prepared a written list of questions, dated November 2, 1987, about the proposal (G.C. Exh. 8). He delivered the questions to either Gozalez or C. Jamison in the Employer's human relations department.

Jamison sent Morris a letter on November 23 (G.C. Exh. 9) which contained answers to some of the questions. Morris telephoned Jamison after he received Jamison's letter to complain that Jamison had been too generalized in his response. He told Jamison the Union needed the Employer to be more specific.

On December 8, Morris wrote Jamison that he received Jamison's November 23 letter but that it had not answered a number of questions posed by the Union in its November 2 document. Morris' December 8 letter (G.C. Exh. 10) enclosed a copy of his November 2 questions with those assertedly unanswered circled. Also, Morris propounded some additional questions.

Morris testified that the ethics proposals were only briefly mentioned during the parties' joint executive meetings in December 1987 and January 1988. At those sessions, Morris recalled the Employer's representatives asking what was the status of the ethics subject, and the Union responded it had asked questions and were still awaiting management's response. Also, Morris claimed the Union requested the Employer to bargain over the ethics proposals during this time period.

Jamison sent Morris a letter on February 4, 1988 (G.C. Exh. 11), in response to Morris' December 8 letter. This letter from Jamison contained more answers to the Union's questions. Morris believed that the Employer had not satisfactorily answered the Union's questions. He spoke with Jamison and told him the Union would review the contents of the February 4 letter and would respond to Jamison.

The parties held no substantive discussions concerning the ethics proposals during their February and March 1988 joint meetings, except for the Employer inquiring whether the Union was ready to respond to Jamison's February 4 letter. Morris recalled the Union simply replied it was still working on a response.

By letter dated April 14 (G.C. Exh. 12), Jamison complained to Morris that the Union had not yet provided the input it promised during the February and March joint meetings and advised Morris the Employer intended to the ethics proposals on May 1, 1988 "if no Union input is received before or at the next" joint meeting.

The next joint meeting was conducted on April 28. Morris delivered a document entitled "Union Response to the Company Proposed Business Ethics Policy" to Jamison at the meeting (G.C. Exh. 13). This response contained the Union's position over some of the Employer's proposals and contained the Union's suggestions for changes. Also, the Union declared it "is prepared to established [sic] negotiation meet-

ings on the Ethics Policy Proposal," asked the Employer to advise when it is prepared to meet, and give the Union enough notice so it could have its "solicitor" present for those negotiations.

After the April 28 meeting, Gonzalez agreed to schedule a separate executive session with the Union to discuss the ethics policy on May 26. However, the May 26 meeting was not conducted, because Gonzalez discovered the union representatives were scheduled for regular work that day. Under the Employer's accounting procedures, the Employer would have suffered increased costs if there actually had been a joint meeting of the parties on May 26. The May 26 meeting was canceled, but Gonzalez promised to raise the ethics issue at the regularly scheduled monthly meeting slated for May 24.

On May 24, Gonzalez told the union representatives that he believed an impasse existed and the Employer would implement the ethics policy on June 1. The Union told the Employer representatives the Employer had an obligation to negotiate this matter with the Union and charged the Employer with having failed to do so.

The policy actually was implemented on June 1 and the parties have had no further negotiations on the subject. The Union contends no material substantive discussions were held between the parties regarding the ethics policy proposals, with one exception. Morris acknowledged that Jamison addressed the issue of the extent to which disciplinary action taken against a bargaining unit employee could be challenged. In that regard, Morris recalled Jamison telling the Union that disciplinary actions would be subject to the contractual arbitration provisions, but the ethics policy itself was not arbitrable.

Finally, Morris claimed the Union told the Employer that the ethics policy subject was of such a magnitude that negotiations over that subject could not be conducted during the regular monthly joint executive meetings. Rather, Morris said the Union requested such negotiations be conducted at meetings specifically arranged for that purpose. Except for the scheduling the May 26 meeting (canceled without convening) the only discussions concerning the ethics policy occurred during the parties' regular monthly meetings. Morris claimed, without contradiction, that no more than 10 or 15 minutes was devoted to discussion of the ethics policy at any of the monthly meetings.

IV. ANALYSIS

A. Videotaping

General Counsel argues that the videotaping of the employees in the "Principles of Progress" tape is a mandatory subject for collective bargaining. As such, General Counsel contends the Employer was obliged to notify the Union of its intention to engage in the videotaping and give the Union a chance to bargain over the terms and conditions of the taping. The Union agrees with this position. Further, the Union cites *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), also cited by General Counsel, as having established the criteria which should form the foundation of a finding that the videotaping in this case is a mandatory bargaining subject.

The Employer asserts the videotaping was not a condition of employment and, therefore, was only a permissive subject for bargaining. As such, the Employer asserts it could engage

in that activity without prior notice to, or consultation with, the Union (*NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958)).

Alternately, the Employer claims the Union waived its right to bargain, if such right ever existed. Finally, the Employer urges that the videotaping under consideration was conducted in accord with past practice and could not constitute an unlawful unilateral change in the working condition of the bargaining unit employees. The Employer states, in any event, a "unilateral change to be unlawful, must be material, substantial, and significant (*Alamo Cement Co.*, 281 NLRB No. 110)" [1986].

Inasmuch as the Employer's failure to give the Union advance notice of the taping is uncontested, I shall deal principally with the matter of whether or not the evidence reflects videotaping is a mandatory bargaining subject.

General Counsel offers several bases for her position: (1) the parties' past practice shows the Employer historically bargained with the Union over use of employees as volunteers for activities outside their regular work duties (*Kendall College*, 228 NLRB 1083, 1087 (1977)); (2) the Employer's decision of use employees for its own public relations purposes is not the type of decision insulated from mandatory collective bargaining as a strictly managerial or entrepreneurial decision (*Otis Elevator Co.*, 283 NLRB 223 (1987); and (3) because the interviews which led to the final version of the videotape required employees to discuss their views of their working conditions, the videotaping process required the employees to submit to attitude surveys, over which the Union was entitled to receive prior notice by virtue of its status as the employees' exclusive collective-bargaining representative (*Bob's Big Boy Restaurants*, 264 NLRB 432 (1982)).

Resolution of the videotaping issue requires scrutiny of its innate characteristics. No party has cited decisional precedent directly in point; nor has my independent research uncovered any such authority. Thus, recourse is made to the Supreme Court's declaration of relevant factors to be considered in deciding whether a particular subject matter falls within the ambit of the Act's phraseology "wages, hours, and other terms and conditions of employment" (Sec. 8(d) of the Act).

In *Ford Motor Co.*, supra, the Supreme Court concluded that the Board's "consistent view that in-plant food prices and services are mandatory bargaining subjects is not an unreasonable or unprincipled construction of the . . . [Act] . . . and that it should be accepted and enforced" (441 U.S. at 498). The Court noted three standards it used in making this conclusion. Those standards are, whether (1) the matter under consideration is of deep concern to workers; (2) the matter is plainly germane to the working environment; and (3) the matter is among those managerial decisions which lie at the core of entrepreneurial control.

Further, the Court observed that the facts of the *Ford Motor* case illustrated that the disputed subject matter gave rise to "substantial disputes" and that "The trend of industrial practice supports . . . [the] . . . conclusion" that that subject matter should be one for mandatory collective bargaining.

I find the evidence shows the *Ford Motor* factors, applied here, militate in favor of a conclusion that the Employer's videotaping of unit employees is a mandatory bargaining subject.

It is virtually inescapable that the employees' participation in taping of "Principles of Progress" was, and is, both a matter of deep concern to them individually and also germane to their working environment. The record reflects one of the Employer's bases for its claim the videotaping is not a mandatory bargaining subject consistently has been that participation was "voluntary." In my view, the facts belie that contention.

The solicitation of employees to participate was initiated by a memorandum between the Employer's training center and its human relations staff. Then, supervisors actually transmitted the "invitation," at least to employees Shields and Probanz.³ Even though there is no evidence that the supervisors explicitly compelled the employees to participate, their authority over the employees cannot be ignored in an assessment of the actual nature of the solicitation. This is especially true when examined in the context of the other attendant circumstances.

These circumstances include the fact that the videotaping occurred during the unit employees' regular working time; the Employer paid the employees for the time spent during the videotaping interview; and the employees were required to orally reveal their opinions concerning a variety of employment conditions. (For example, the tape (G.C. Exh. 17) shows Shields made a recommendation that the Employer should strive to have employees feel they are making personal contributions in the workplace; and was, in effect, critical of procurement procedures by commenting that persons who place orders in the Employer's behalf should be more cost-conscious. Similarly, Probanz cautioned that she expected management and other personnel to behave with high ethical standards and criticized the Employer for having lost its personal touch with employees.)

That Shields and Probanz apparently were not inhibited in expression of their views does not show their participation was voluntary. The surrounding circumstances are more cogent indicators of their status. In my view, the manner in which the employees were chosen to participate, how they were told about it, the use of working time and Employer's funds for financing the participation, and the resultant necessary revelation of employee opinions regarding working conditions coalesce to create an atmosphere which tends to be coercive within the Act's framework.

Patently, the voluntary nature of employee participation in the taping was a matter of deep concern both for the employees selected and for the Union. In testimony not previously described, Shields explained she posed questions regarding the taping to R. Pierce of the Employer's human relations staff (and Probanz' supervisor) and told him she would not read from a script; then consulted her husband (a union representative) about the taping; and questioned M. Reinhart and T. Tatersall (the Employer's unit manager and area consultant, respectively) about why she had been selected. After Probanz discussed the matter with her supervisor, Pierce (as described above), she consulted Shields and asked what Shields knew about the taping. (Shields' husband is Probanz' union representative).

Also, the Union wasted no time in challenging the propriety of its solicitation of employees for the "Principles of

Progress" taping. Union President Morris contacted Employer Manager Little as soon as Morris learned that Shields and Probanz had been asked to engage in the taping. The Union's protests were persistent, numerous, and accompanied by the filing of the first (4-CA-17014) of the instant three consolidated unfair labor practice charges.

Clearly, the essence of the Union's protests was the perception of its officials that this particular taping was materially different from earlier times that the Employer filmed employees on videotape. The record reflects that about one-third of the Employer's library, which contains about 560 tapes, depict employees in speaking roles of one type or another. Part of the Employer's defense to the instant allegation is that "Principles of Progress" was made in conformity with its past practice. To support this proposition, the parties stipulated to the relevant contents of several videotapes made by the Employer between 1981 and 1987.⁴

My review of the parties' stipulation persuades me the Union was well-founded in its concerns that "Principles of Progress" constituted an important departure from the earlier taping of employees. Specifically, I find no evidence that the earlier tapes showed employees in speaking roles giving their views, or opinions of, working conditions or the Employer's operations. Essentially, the earlier tapes carried employees in candid profiles of them at their work stations; speaking briefly in an educational vein about safety and health; or accepting awards.

In sharp contrast, "Principles of Progress" precisely focused on the speaking employees pointedly to present their opinions on a variety of work-related subjects such as costs, business ethics, interrelationships among people in their workplace, and environmental conditions.

I find the subjects covered during the employee interviews, and the employees' responses, especially in the unedited version of the tape (not made part of the instant record) create a situation which is inherently intimidating. This is particularly manifest when viewed in the light of the way employees were selected, solicited, and paid for their participation.

I conclude the employee interviews underlying "Principles of Progress," in effect, comprised a situation analogous to employee attitude surveys which have been found unlawful. General Counsel's citation of *Bob's Big Boy*, supra, is illuminating. There, the employer conducted a widespread attitude survey among its employees designed to improve working conditions. That survey actually resulted in changes being made. The Board found *Bob's Big Boy's* survey comprised unlawful direct dealing with employees, in part because the survey's subject matter "concerned working conditions" (264 NLRB at 434).

I recognize the instant case is not exactly in point with *Bob's Big Boy*. "Principles of Progress" was intended as a means of communicating the Employer's human relations principles to an audience of about 3600 employees at Chambers Works. There is no evidence any of the instant employee interviews resulted in changed policy or working conditions. Nonetheless, I conclude the vice present in *Bob's Big Boy* also exists here.

³Only these employees testified to the mechanics of their participation. In the absence of countervailing testimony, I presume all unit employees who appeared in the tape's final version also were solicited by supervisory personnel.

⁴The stipulation's text appears at Tr. 297-301 and was received by me in lieu of the videotapes involved (which appear as rejected E. Exhs. 6-8) so as not to burden the official record with the considerable irrelevant contents of the tapes.

Shields and Probanz, and I presume the other unit employees who appear in "Principles and Progress," were subjected to interviews which required them to give their views on various working conditions for periods of time considerably longer than their actual appearances on the final tape. As previously noted, both Shields and Probanz were interviewed for slightly more than 1 hour; but the total time each is shown speaking on the tape is approximately 43 seconds for Shields and approximately 30 seconds for Probanz.

What occurred here is intrusive. It is more than an otherwise innocuous opinion poll undertaken, for example, by a "roving" reporter. The sampling of respondents to the interviewer's questions was not made at random. Specific employees were solicited by the Employer's supervisors. This made suspect the "voluntary" character of employee participation. The selection and payment process also taints this videotaping.

This is a situation of an employer eliciting private and personal information directly from its employees, instead of dealing with their recognized collective-bargaining agent. Surely, this context is a classic case for the application of the legal principles which demand a collective-bargaining representative be given notice of an employer's intentions and a chance to bargain about them.

No extensive discussion or analysis is needed to establish the videotape issue meets the *Ford Motor* standard by which it must be clear that the videotaping does not lie at the core of the Employer's entrepreneurial control. If the taping fits this category of employer decisions, the Employer must prevail. Such decisions are identified in *Otis Elevator Co.*, 269 NLRB 891 fn. 5 (1984). The Employer is not in the videotaping or film-making business. There is no basis in this record to sustain a claim that the disputed videotaping cannot be a mandatory bargaining subject because it interferes with, or impedes, privileged managerial decision-making.

The Court's *Ford Motor* observation that the pricing of in-plant-supplied food and beverages can lead to substantial labor disputes has a parallel in the case before me. The record, in its totality, demonstrates the parties' vigorous pursuit of their opposing intractable positions regarding videotaping. Each has steadfastly remained firm during the period in which the disputed events took place; and each maintained its position throughout these proceedings. Sixteen months have elapsed without resolution of the issue.

The circumstances described in the immediately preceding paragraph illustrate that the Employer's videotaping of unit employees has already reached the level of a substantial dispute between the Employer and Union. In this posture, *Ford Motor* teaches that "National labor policy contemplates that areas of common dispute between employers and employees be funneled into collective bargaining" (441 U.S. at 499). I find this quotation most apt in this case. It is an impressive, though not conclusive, observation of one of the Act's purposes which I believe should be considered seriously in resolving the videotape issue. Doing so lends support to a conclusion that the Employer's videotaping ought to be a mandatory bargaining subject.

As noted above, the *Ford Motor* Court took cognizance of the trend of industrial practice. Concededly, *Ford Motor* contained documentation of the then-current trend concerning cost of employer-supplied food services (see *Ford Motor*, fn.

11), but the instant case is barren of such evidence on an industrywide basis.

However, the Employer's own evidence, adduced through Little, together with its oral and written arguments in this case, was designed to show that the Employer maintained a longstanding practice of using videotape for a variety of purposes. That evidence succeeded in demonstrating that employees had been videotaped in various situations. Evidence not previously reported reflects the Employer produces 30-40 videotapes annually. This background, I conclude, establishes such an "industrial practice," albeit intraemployer and not industrywide, which further bolsters the conclusion that the disputed videotaping should be a mandatory subject for collective bargaining.

I have earlier noted that the Employer argues that the Union waived its right to notice and bargaining over the videotaping, if such a right were declared to exist. The foundational facts upon which this argument is predicated are uncertain (see Employer's posthearing brief, p. 23). Despite this, I have culled the record to determine whether the waiver argument can be substantiated.

The rapidity with which the Union complained to the Employer over the videotaping involved here has been reported above. The evidence must show the Union "clearly and unmistakably" (*Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6th Cir. 1963)) acted in some way to waive its bargaining right. My study of the record has produced no probative evidence to sustain the Employer's waiver contention.

Finally, I must note the Employer's defense relies heavily on its claim that the production of "Principles of Progress" totally conformed to the past practice of the parties. Paradoxically, I find the Employer's reliance on past history virtually buttresses the positions of the opposing litigants rather than the Employer.

Historically, it is uncontroverted that the Employer gave the Union advance notice of, and a chance to bargain over, use of employee "volunteers" for events outside the scope of the parties' contractual provisions which related to lateral transfers of unit employees. None of those projects required skills or functions, or were directly connected to, unit employees' regular job tasks.

There is no evidence that anyone other than bona fide volunteers participated in such events. Thus, I find the existence of this past practice persuasive evidence that the Employer itself historically recognized that solicitation of volunteers to participate in noncontractual, but work-related, activities is such a term and condition of employment as would impose a bargaining obligation upon it (see *Kendall College*, 228 NLRB 1083, 1087 (1977)).

On the foregoing discussion relative to the videotaping issue, I find that the Employer's solicitation of employees to participate, and videotaping them, in "Principles of Progress" are mandatory bargaining subjects and that the Employer's failure to give the Union advance notice of such events and an opportunity to bargain about them constitutes a refusal to bargain, in violation of Section 8(a)(5) and (1) of the Act.

B. The Railroad Map

Relevance of the narrow gauge railroad map to the Union's collective-bargaining obligations is not disputed. All

parties apparently acknowledge the map's value as an information source enabling a comprehensive toxic waste study to be made.

However, the Employer (contrary to the General Counsel and Union) contends that the conditions it attached to the Union's use of the map were a reasonable protection of the Employer's legitimate interests.

As described above, the Employer delivered the map,⁵ together with a request the Union agree (1) only the Union and its legal counsel would use the map; (2) the Union would not make the map available to nonemployer institutions such as "governmental entities, interest groups, media, etc." without the Employer's written permission; and (3) no copies of the map would be made.

The pivotal issue is whether the Employer's conditions were unduly restrictive under the circumstances. The General Counsel's evidence shows the Union requested production of the railroad map in consequence of employees' expressed concerns over a marked increase of cancer cases, open heart surgeries, and brain tumors among Chambers Works employees.

The Employer's evidence, through Little's quoted testimony as it appears in section III.C, above, shows the conditions were established to conform to the Employer's own standards of what would be an appropriate use of the map; and that the Employer sought to insulate itself from its perceived mischaracterizations of its health and safety record and activities.⁶ I can find no evidence or explicit argument by which the Employer claims anything about the map is confidential.

The law requires a balancing of interests, including the examination of all relevant circumstances of each case and the need for disclosure, to resolve the map issue (*Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979)). In *Detroit Edison*, the Supreme Court balanced the union's interest in obtaining information relevant to contract administration against the employer's interest in maintaining security of psychological tests questions, answers, and scores. The court upheld the employer's refusal to supply that information.

Applying the requisite balancing test, I conclude the Employer's conditions were not warranted. No challenge whatsoever appears either to the efficacy of the Union's desire to conduct an environmental impact study or to Morris' assertions of increased serious health problems.

In contrast, my review of the various testimonial explanations of the Employer's need to impose conditions leads to the conclusion those conditions were developed merely for the Employer's convenience and comfort. I recognize the Employer is entitled to fair appraisals, by "outsiders," of its health, safety, environmental (and other) programs.

However, the record does not at all nearly reflect how the conditions imposed on delivery of the map will achieve that end. Even if I were satisfied the evidence showed how the conditions could safeguard the Employer's position, on bal-

ance, I conclude the need to conduct an environmental impact study, and the map's role in such a study, far outweigh and override the reasons provided to impose those conditions.

The above discussion of the map issue leads me to find, and I now do so, that the Employer's imposition of conditions on delivery of the narrow gauge railroad map, in the surrounding circumstances, was tantamount to a refusal to comply with the Union's request for information necessary and relevant to its performance of its collective-bargaining obligations. Accordingly, I find the Employer refused to bargain in violation of Section 8(a)(5) and (1) of the Act, as alleged in paragraph 8 of the complaint.

C. The Ethics Policy

The evidence shows all parties regarded the application of the Employer's business ethics policy to Chambers works bargaining unit employees an appropriate, and mandatory, bargaining subject. The Board so holds. *Peerless Publications*, 231 NLRB 44 (1976), reaffirmed on this point in supplemental decision 283 NLRB 334 (1987).

The thrust of the Employer's defense to the allegation that it unlawfully unilaterally instituted the ethics policy for the bargaining unit employees is that it was privileged to do so because the parties had reach an impasse.

That position is based on the observation that 9 months (September 1987–May 1988) elapsed between presentation of the policy to the Union and Gonzalez' impasse declaration; that the Employer responded to the Union's requests for further information; and that the Union demonstrated its unwillingness to engage in discussions on the subject when it caused cancellation of the May 26 special meeting by having all its representatives scheduled for work that day.

The Employer argues, in its posthearing brief, that the above factors caused it to believe there was "no willingness on the Union's part to proceed with meaningful bargaining, [so] the . . . [Employer] . . . considered the bargaining to be at an impasse" (E. Br. p. 32). I find the Employer's reliance on these factors misplaced.

The existence of an impasse is a matter left to the judgment of the trier of fact. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *affd.* 395 F.2d 622 (D.C. Cir. 1968). It does not rely solely on the passage of time, even though the length of negotiations is an element the Board considers to resolve this issue. Time is not necessarily controlling. Compare *Lou Stechers Supermarkets*, 275 NLRB 475 (1985), with *SGS Control Services*, 275 NLRB 984 (1985).

A variety of factors enters into a decision as to whether an impasse in bargaining is present in any particular circumstances. Some of those factors apply to the instant case. They are: (a) to what extent the parties have maintained rigid positions (*Lou Stechers Supermarkets*, *supra*; *Triple A Maintenance Corp.*, 283 NLRB 449 (1987); (b) whether there is a possibility of agreement through compromise (*Union Terminal Warehouse*, 286 NLRB 851 (1987); and whether both parties mutually understand they are at impasse (*Colfor, Inc.*, 282 NLRB 1173 (1987)).

I concede substantial time elapsed from the time the Union received notice the Employer intended to apply the ethics policy to unit employees until the Employer implemented the policy for those employees. However, assuming the issue had been raised at each of the nine regular monthly meetings,

⁵No party asserts the delivery, and its immediate return by the Union, is relevant to disposition of the instant issue. I, too, consider these facts not critical.

⁶This purpose is evident by the following excerpt from p. 4 of the Employer's posthearing brief. "The Respondent did . . . attach conditions to the projected use of the map, in an attempt to be able to provide information to outside sources, as required, to better place matters in proper perspective as to material that had in earlier years been deposited in the ground at the site" (Emphasis added). Also see Emp. Br. fn. 4.

and also was discussed for the full 15-minute maximum established by Morris' uncontradicted testimony, the parties would have discussed the issue no more than 2-1/4 hours during that entire period.

This observation, coupled with the circumstances where all the correspondence indicates the Union was searching for information during much of this time, tends to negate a conclusion that this record demonstrates rigid adherence of the parties to their positions. In my view, the facts show the Union could not have formulated its bargaining position before the aborted May 26 meeting had been arranged. The fact that the Union still was requesting information in its April 28 letter (G.C. Exh. 13) supports this conclusion.

Next, I consider the actual scheduling of the aborted May 26 meeting a persuasive indicator that the record as a whole does not demonstrate that additional meetings between the parties would have proved futile. The mere fact that the Employer agreed to schedule and participate in, and did schedule, that special meeting belies any contention that a further meeting or meetings over the ethics policy could not have been productive. The arrangement to meet on May 26 reflects a willingness to meet (*Colfor*).

The opposing versions of what took place at the May 24 regular meeting somewhat vary. The variations relate the the Employer's contention that it was justified in assuming an impasse existed because the Union manifestly refused to bargain over the ethics policy. I place little probative value on the Employer's evidence which was adduced to cast the Union in a position of wrongdoer.

I find the testimony of Morris (for the Union) and Little and Gonzalez (for the Employer), in their composite, considerably more germane and valuable to a resolution of the impasse issue. Their testimony is confluent in what I consider the most important respect. Specifically, it clearly shows agreement that the parties did not engage in substantive discussions concerning the ethics policy on May 24.

In such a circumstance, it is entirely appropriate to rely on the implications which may be derived from the Employer's actions in having arranged to meet on May 26. Because no negotiations on the ethics policy took place on May 24, after Gonzalez said he would raise the matter that date to replace the canceled May 26 discussions, I conclude neither party was justified in assuming it would be futile to engage in further discussion. In the absence of the validity of such an assumption, a bargaining impasse cannot exist (see *Alsey Refractories Co.*, 215 NLRB 785 fn. 2 (1974)).

Finally, I find the record totally devoid of evidence from which I could conclude that parties had a common understanding they were at impasse. Gonzalez' declaration of impasse, in all the instant circumstances, clearly was a unilateral expression of the Employer's view—a view which has been shown above to be without merit.

On all the discussion concerning the ethics policy, I find the Employer's unilateral implementation on June 1 constitutes a refusal to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. E. I. du Pont de Nemours & Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Chemical Workers Association, Inc., a/w International Brotherhood of Dupont Workers is a labor organization within the meaning of Section 2(5) of the Act.

3. All production, engineering, stores and transport, construction, and laboratory employees at Chambers Works; and all clerical employees at Chambers Works in the units described in the November 5 and October 22, 1982 collective-bargaining agreements between the Employer and Union constitute appropriate units for collective bargaining within the meaning of Section 9(b) of the Act.

4. The Employer's solicitation of employees to participate, and videotaping them, in "Principles of Progress" is a mandatory subject for collective bargaining.

5. The Employer's solicitation of employees to participate, and videotaping them, in "Principles of Progress," without first having given the Union advance notice and an opportunity to bargain about those actions, constituted a refusal to bargain violative of Section 8(a)(5) and (1) of the Act.

6. The Employer refused to supply the Union with information relevant and necessary to the performance of its collective-bargaining obligations, in violation of Section 8(a)(5) and (1) of the Act, when it imposed conditions upon delivery of a map showing the 1965-1970 location of the narrow gauge railroad at Chambers Works.

7. The Employer unlawfully failed to bargain collectively with the Union in violation of Section 8(a)(5) and (1) of the Act on June 1, 1988, when it unilaterally implemented its business ethics policy for the employees in the bargaining units found appropriate in this case and represented by the Union.

8. The above unfair labor practices affect commerce within the meaning of the Act.

THE REMEDY

Having found that the Employer engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Regarding the affirmative action needed to rectify the unfair labor practices in this case, I shall order the Employer

1. On the Union's request, notify and bargain with the Union concerning the use of employees in "Principles of Progress" and the terms and conditions of solicitation, and use of, bargaining unit employees in any other videotapes produced, or which will be produced, by or on behalf of the Employer.

2. To withdraw "Principles of Progress," and any other videotapes in which bargaining unit employees participated without the Union first having had the chance to discuss the taping with the Employer, from exhibition and screening to other employees and other persons until the Employer has given the Union an opportunity to bargain about videotaping, as provided in subparagraph A, immediately above;

3. On the Union's request, forthwith deliver the original, or an exact copy, of a wall-size map showing the location of the narrow gauge railroad at Chambers works between 1965 and 1970.

4. On the Union's request, bargain collectively with the Union over the application of the Employer's business ethics policy to bargaining unit employees.

5. On the Union's request, incorporate any agreements reached on the subject matter of videotaping and ethics policy into a written document, and sign it.

The record reflects that the ethics policy contemplated disciplinary action could be taken against employees who breached its terms. In order to promote meaningful bargaining between the parties, I find it necessary to restore conditions to where they were before the unlawful conduct occurred insofar as possible. Accordingly, I shall further order the Employer.

6. Rescind any and all disciplinary action against any bargaining unit employees who may have been disciplined for breaches of the business ethics policy; to expunge all references to such discipline from the employees' personnel records; and to simultaneously notify the affected employee(s) and the Union such rescission has been accomplished and that no disciplinary action in the future will be based upon the discipline so rescinded.

Finally, the Employer shall be ordered from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights,⁷ and to post appropriate notices to the attention of its employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, E. I. du Pont de Nemours Company, Deepwater, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Solicitation of bargaining unit employees represented by Chemical Workers Association, Inc., affiliated with International Brotherhood of Dupont Workers to participate in videotaping, and videotaping such employees, without advance notice to that labor organization and giving it an opportunity to bargain over such activities.

(b) Exhibition and screening of the videotape, "Principles of Progress" to any of its bargaining unit employees or any other persons until the above-named labor organization has been given an opportunity to bargain about the subject matter as described in the immediately preceding paragraph.

(c) Application of its business ethics policy to employees in the bargaining units represented by the above-named labor organization without first giving that organization an opportunity to bargain over such application.

(d) Attaching conditions to the delivery to said labor organization of a wall-size map of the Chambers Works narrow gauge railroad as it was in 1965-1970.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Notify and bargain with Chemical Workers Association, Inc., affiliated with International Brotherhood of Dupont Workers, at its request, concerning solicitation of bargaining unit employees, and the terms and conditions of their participation, in the "Principles of Progress" videotape and other videotapes produced, or which will be produced, by or on behalf of the Employer; and if agreements are reached, reduce them to writing and sign them.

(b) Deliver to the above-named labor organization at its request the original, or an exact copy, of a wall-size wall map showing the location of the narrow gauge railroad at Chambers Works between 1965-1970.

(c) Bargain with said labor organization, at its request, over application of the business ethics policy to employees in the units represented by that labor organization; and if agreements are reached, reduce them to writing and sign them.

(d) Rescind any and all disciplinary action taken against any bargaining unit employee for breaches of the business ethics policy; immediately expunge all references to such discipline from the affected employees' personnel records, and simultaneously notify such employee(s), and the Union, in writing, that such rescission has been accomplished and that no disciplinary action in the future will be based upon the discipline so rescinded.

(e) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the extent to which the Employer complies with the terms of this Order.

(f) Post at its Chambers Works facility copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁷No evidence was presented to show the Employer has a proclivity to violate the Act. I conclude a so-called broad order is not needed. See *Hickmott Foods*, 242 NLRB 1357 (1979).

⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."